ILLINOIS POLLUTION CONTROL BOARD
April 20, 2000

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Complainant,	)	
	)	
v.	)	PCB 00-127
	)	(Enforcement - Land)
DAYNE ROGERS, an individual, BLACK GOLD INTERNATIONAL, a dissolved corporation, and CROSBY & ASSOCIATES, P.C., an Illinois professional corporation,	)	
	)	
Respondents.	)	

ORDER OF THE BOARD (by S.T. Lawton, Jr.):

This matter is before the Board on a February 17, 2000 motion to dismiss filed by one of the respondents, Crosby & Associates, P.C., (Crosby). Because of the parties' submissions of evidentiary materials, including an affidavit and quitclaim deed, the Board construes Crosby's motion as one for summary judgment rather than to dismiss. For the reasons set forth below, summary judgment is granted in favor of Crosby.

PROCEDURAL BACKGROUND

On January 31, 2000, a complaint was filed by the People of the State of Illinois (State) filed a complaint seeking reimbursement for costs incurred in the clean up of accumulated used and waste tires at a site in Winnebago County pursuant to Section 55.3 of the Environmental Protection Act (Act) (415 ILCS 5/55.3 (1998)) based on Crosby's alleged ownership of the land. On February 17, 2000, Crosby filed a motion to be dismissed (Motion) from the action asserting that it was not the owner of the site or the accumulated tires. The State filed its response (Resp.) on February 24, 2000, arguing that Crosby should not be dismissed because it is the owner of the site. In support of its position, the State attached a copy of a quitclaim deed that, in form, conveyed the subject property to Crosby. On March 7, 2000, Crosby filed a motion for leave to file a reply accompanied by its proposed reply to the State's response (Reply) contending that for reasons hereinafter set forth, Crosby was not the owner of the site. On March 10, 2000, the State filed a response to Crosby's motion for leave to file a reply. On March 20, 2000, Crosby filed a reply to the State's response to Crosby's motion for leave to file its reply.

On March 21, 2000, Hearing Officer John Knittle granted Crosby leave to file a reply and the State 14 days to file its surreply. Pursuant to Hearing Officer's John Knittle's March 21, 2000 order, the State filed its surreply to Crosby's reply on April 4, 2000. In the surreply, the State contends that Crosby's and respondent Rogers' agreement to obtain a broker for sale of the property is inconsistent with Crosby's stated intention to hold title to the property to

protect its security interest, and that the length of time during which Crosby has held title to the property (three and a half years), is inconsistent with the characterization of the transaction of a mortgage. (Surreply at 2).

DISCUSSION

Summary judgment is appropriate when the pleadings, together with other items in the record, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Dowd & Dowd, Ltd. v. Gleason, 181 Ill. 2d 460, 693 N.E.2d 358 (1998). In ruling on a motion for summary judgment, the Board must consider the pleadings and other evidence "strictly against the movant and in favor of the opposing party." *Id*. Summary judgment "is a drastic means of disposing of litigation," and therefore it should be granted only when the movant's right to the relief is "clear and free from doubt." *Id*. However, a party opposing a motion for summary judgment must "present a factual basis which would arguably entitle [it] to a judgment." Gauthier v. Westfall, 266 Ill. App. 3d 213, 219, 639 N.E.2d 994, 999 (2d Dist. 1994). The Board may grant Crosby's motion only if, after construing the documents supporting the motion in the most favorable light to the nonmovant, it finds no disputed issues of fact. Draper v. Frontier Insurance Co., 265 Ill. App. 3d 739, 638 N.E.2d 1176 (2d Dist. 1994).

In this matter there are no issues of material fact. Crosby has provided the Board with an affidavit which states that Crosby took a quit claim deed to the site as security for an unpaid debt, and that it was not the parties' intention to convey ownership. The State has not provided any contradictory evidence, such as counteraffidavits, of the parties' underlying intention. The statements in Crosby's affidavit are therefore accepted as true. See People v. Continental Can Company, Inc., 28 Ill. App. 3d 1004, 329 N.E.2d 362 (4th Dist. 1975); Zedella v. Gibson, 165 Ill. 2d 181, 650 N.E.2d 1000 (1995) (Supporting affidavits unchallenged by counteraffidavits or by other appropriate means deemed admitted and taken as true.) The State predicates Crosby's liability on its site ownership. Complaint at 5, paragraph 22. As explained below, the Board finds, as a matter of law, that Crosby is not an owner, and therefore grants summary judgment in Crosby's favor.

The State's Complaint

By the complaint, the State seeks reimbursement for costs incurred cleaning up an accumulation of used and waste tires, pursuant to Section 55.3 of the Environmental Protection Act (Act), 415 ILCS 5/55.3 (1998). In its Motion, Crosby asserts a number of facts which it argues insulate it from liability for the State's costs. While paragraph four of the complaint alleges that Crosby owned the site at all times relevant to this complaint and accordingly ownership of the accumulation of tires, Crosby asserts that: (1) it was not an owner or operator of the accumulation of the used or waste tires removed from the site; and (2) its taking a quitclaim deed to the site does not make it an owner or operator of the site as required by Section 55.3 of the Act.

Arguing that liability is predicated upon ownership of the accumulation and not ownership of the site, Crosby cites specifically to Section 55.3(g):

> the owner or operator of any accumulation of used or waste tires at which the [Illinois Environmental Protection] Agency has undertaken corrective or preventive action under this Section shall be liable for all costs thereof incurred by the State of Illinois. 415 ILCS 5/53.3(g)(1998).

In response to Crosby's Motion, the State argues that Crosby's ownership of the site is sufficient to establish liability for the corrective action. The State asserts that Crosby acquired title to this property on September 5, 1997, from Dayne Rogers and Black Gold International, and it attaches a copy of a quitclaim deed, recorded on September 17, 1997, in Winnebago County, to support such assertions. (Resp., Exh. A) The State further argues that, on August 4, 1998, the Illinois Environmental Protection Agency (Agency) gave notice to Crosby as required by Section 55.3(d) of the Act. The relevant subsection of Section 55.3 provides:

> d. The Agency shall have authority to provide notice to the owner or operator, or both, of a site where used or waste tires are located, whenever the [Illinois Environmental Protection] Agency finds that the used or waste tires pose a threat to public health or the environment, or that the owner or operator, or both, is not proceeding in accordance with a tire removal agreement under Section 55.4.

Crosby's Affidavit

The Board notes the following statements from the affidavit of Michael S. Crosby, Attachment A to Crosby's Reply, which the Board accepts as evidence in support of Crosby's requested relief.[1]

> 2. A Law Office of Crosby and Associates, P.C. represented and provided legal services to Mr. Dayne Rogers and/or Black Gold International in several matters.
>
> 3. Mr. Rogers was not able to pay for these services, and therefore, Crosby and Associates P.C. took a deed absolute as security for Mr. Rogers' debt. * * *
>
> 4. It is the law firm's intention to merely release its security interest in the property back to Black Gold International when Mr. Rogers' debt is repaid.

[1] A court will take as true those facts in a defendant's affidavit supporting his motion to dismiss if the plaintiff fails to refute those facts in a counteraffidavit, notwithstanding contrary unsupported allegations in the plaintiff's pleadings. Griffin v. Universal Casualty Co., 274 Ill. App. 3d 1056, 654 N.E.2d 694 (1st Dist. 1995).

5. Neither I nor Crosby & Associates, P.C. had any involvement in the operation of Mr. Rogers' business on the property at any time.

In the affidavit, Crosby asserts that the act of taking a quitclaim deed to the property was not intended to convey an ownership interest in the site. Rather, Crosby merely took a security interest in the property for an unpaid debt. Crosby cites several appellate opinions to support its position that the quitclaim deed executed by Rogers in its favor did not convey ownership.

In one of these cases, Metcalf v. Altenritter, 53 Ill. App. 3d 904, 369 N.E.2d 498 (5th Dist. 1977), the court cited Section 5 of the Mortgage Act (765 ILCS 905/5), and stated:

> In equity, the substance of a transaction controls, not its form. Accordingly, a conveyance of land, seemingly absolute, will be treated as a mortgage if it were intended as security for the payment of money. The one asserting that a deed absolute in form is a mortgage has the burden of proving that fact in a clear, satisfactory and convincing manner. The question whether a deed which is absolute in form is to be taken as a mortgage depends upon the intentions of the parties at the time of its execution. 369 N.E.2d at 502 (citations omitted).

Section 5 of the Mortgage Act (765 ILCS 905/5) provides:

> Every deed conveying real estate, which shall appear to have been intended only as a security in the nature of a mortgage, though it be an absolute conveyance in terms, shall be considered as a mortgage. (emphasis added).

Crosby has provided the Board with an affidavit, accompanied by a letter agreement between Crosby and Rogers, which supports the fact that Crosby holds indicia of ownership primarily to protect a security interest for unpaid legal services. Pursuant to the Section 5 of the Mortgage Act, Rogers did not convey ownership of the site to Crosby. Accordingly, since the State's complaint predicates liability for the cost of removal action on ownership of the land, Crosby is not liable to the State for its costs.

The Board disagrees with the State's assertions in its surreply respecting the parties' intent here. Their agreement to list the property and obtain a broker is not inconsistent with a mortgage relationship. Nor is the continuation of Crosby's mortgage for three and one-half years inconsistent therewith provided the debt remains unpaid.

The Board recognizes that while the Act provides exemptions to liability under Section 55.3(i), based on certain circumstances, these sections in no way limit the applicability of the Mortgage Act, nor does the absence of reference to the Mortgage Act in Section 55.3(i) negate its applicability. Any limitation on the protection afforded Crosby under the Mortgage Act in the context of the instant proceeding must be accomplished by the legislature and not by the Board.

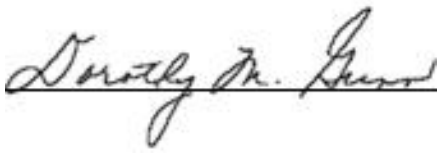
Finally, the Board recognizes that Section 55.3(i) provides defenses to liability to various categories of persons and that mortgagees are not among the listed exemptions. Section 55.3(i)

however, applies only to a "person otherwise liable". The Board concludes today that in accordance with Section 5 of the Mortgage Act, Crosby is not an "owner" and therefore not a "person otherwise liable" for the purposes of Section 55.3(i).

In conclusion, the Board finds that Crosby's affidavit establishes that Crosby did not take an ownership interest in the site and therefore is not liable as an owner under Section 55.3(g) of the Act. For the foregoing reasons, summary judgment is granted and Crosby is dismissed from this action.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above order was adopted on the 20th day of April 2000 by a vote of 5-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board